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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 664

PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER,

v.

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD & OHIO RAILWAY, CAROLINA, CLINCHFIELD & OHIO RAILWAY OF SOUTH CAROLINA, AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

H. J. HAYNSWORTH,
R. S. HUTCHISON,
W. S. O'B. ROBINSON, JR.,
Counsel for Petitioner.

(36,478)

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PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Piedmont and Northern Railway Company, petitioner, prays that a writ of certiorari issue to the United States Circuit Court of Appeals, for the Fourth Cir-

cuit, requiring that, before a decree is entered in that Court, this cause be certified to this Court so that it may review the decree of the District Court of the United States for the Western District of South Carolina, entered in this cause on June 9, 1931, permanently enjoining petitioner from constructing extensions of its lines of electric railway without first obtaining from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction of such extensions (R. 487).

A.

Summary Statement of the Matter Involved.

1. This suit was brought in the United States District Court for the Western District of South Carolina, under Paragraph 20 of Section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, 49 U. S. C. A., Sec. 1 (20), and under Section 24, Paragraph 8, of the Judicial Code, 29 U. S. C. A., Section 41, subd. 8, to enjoin petitioner from constructing extensions of its lines of electric railway without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity under Paragraph 18, Section 1, of the Interstate Commerce Act (R. 2). It was brought on April 16, 1930. The plaintiffs are the Interstate Commerce Commission, and, by intervention, Southern Railway Company, Charleston & Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield &

Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, standard steam railroads serving as interstate carriers in territory served by petitioner's existing lines, and also the territory which would be served by the proposed extensions (R. 73).

2. The question presented is whether petitioner is an interurban electric railway, not operated as a part of a general steam railroad system of transportation, within the meaning of Sec. I (22) of the Interstate Commerce Act, as amended by Transportation Act 1920 (49 U. S. C. A., Sec. I (22)), so as to be entitled to construct and to operate in interstate commerce extensions of its lines of electric railway without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity, pursuant to Sec. I, Paragraphs (18) to (21), inclusive, of the Interstate Commerce Act, as amended by Transportation Act, 1920 (49 U. S. C. A., Sec. I (18) to (22), inclusive).

3. The plaintiffs alleged that petitioner is a common carrier by railroad subject to the Interstate Commerce Act, that it is within the scope of the provisions of Paragraph 18 of Section 1 of the Act, and that the new mileage, which petitioner proposes to construct, would be extensions of its lines within the meaning of that paragraph (R. 2, 3, and 4).

Petitioner admits that it is engaged in the general transportation of freight and passengers in interstate commerce, and that the proposed extensions would be operated in such commerce in connection with

its existing lines, and that it is subject to the Interstate Commerce Act, as amended by the Transportation Act of 1920, except those provisions from the application of which interurban electric railways, not operated as a part or parts of a general steam railroad system of transportation are expressly excluded. From these provisions it claims exemption as an interurban electric railway (R. 59, 60).

It alleged that its existing lines are operated exclusively by electricity; that they are not operated as parts of a general steam railroad system of transportation; that they were constructed and equipped and are maintained and operated as lines of interurban electric railway; and that the extensions would be lines of the same character, operated in the same way (R. 65, 66, 67, 103 and 104).

4. The Court heard the case on its merits, found the facts specially (R. 402), stated separately its conclusions of law on the special findings of fact (R. 433), filed a written opinion (R. 435), and, on June 9, 1931, entered a final decree, in conformity with the prayer of the complaint and the prayer of the bill of intervention of the intervening plaintiffs, permanently enjoining petitioner from constructing the proposed extensions unless and until it first obtains from the Commission a certificate of public convenience and necessity (R. 487). Petitioner duly appealed to the United States Circuit Court of Appeals, for the Fourth Circuit (R. 511). The transcript of the record was filed in that Court on November 23, 1931, and on December 11, 1931, the Court entered an order continuing

the hearing of the cause until the April 1932 Term of the Court (R. 515). This order of continuance was made upon the joint stipulation and motion of the parties in order that petitioner might have an opportunity to present to this Court this petition for a writ of certiorari (R. 514).

5. Petitioner now owns and operates two separate and distinct lines of electric railway, one a line in South Carolina, extending from Greenwood to Spartanburg, a distance of 89 miles, with a branch from Belton to Anderson of 11 miles, and the other a line in North Carolina, extending from Gastonia to Charlotte, a distance of 23 miles, with a branch to Belmont of 3 miles (R. 404). In March, 1927, it was about to undertake the construction of two extensions, one a line from Spartanburg, the present northern terminus of its South Carolina line, to Gastonia, the present southern terminus of its North Carolina line, a distance of 53 miles connecting the two existing lines, and the other an extension from Charlotte to a new northern terminus at Winston-Salem, North Carolina, a distance of 75 miles (R. 125). The Interstate Commerce Commission notified petitioner that it would be expected to make appropriate application for a certificate of public convenience and necessity authorizing the construction of these extensions, and that such application might be filed without prejudice to petitioner's claim of exemption as an interurban electric railway under Sec. I, Paragraph (22), of the Interstate Commerce Act. Petitioner, duly saving and reserving its claim of exemption, did file application for

such certificate. After a hearing the Commission, on April 3, 1928, denied petitioner's claim of exemption, and also denied the certificate on the ground that the extensions were not required in the interest of public convenience and necessity (R. 432; 138 I. C. C. 363). Petitioner, on May 22, 1928, brought suit in the United States District Court, for the Western District of South Carolina, against the United States, under the Urgent Deficiencies Act (28 U. S. C. A., Sec. 47), to set aside and annul that part of the order of the Commission which denied petitioner's claim of exemption as an interurban electric railway. The District Court of three Judges dismissed the suit on its merits (30 F. (2d), 421), and, upon the appeal of petitioner, this Court held that the order of the Commission, being negative in substance as well as in form, infringed no right of petitioner, and therefore did not come within the scope of the remedy afforded by the Urgent Deficiencies Act, and that the District Court should have dismissed the suit for want of jurisdiction. Accordingly the decree of the District Court dismissing the suit on its merits was reversed, with direction to dismiss for want of jurisdiction (280 U. S. 469).

6. On March 10, 1930, petitioner began the construction of the extension from Spartanburg, South Carolina, to Gastonia, North Carolina, which would connect its two existing lines, and was at work on this extension when this suit was instituted (R. 3). The original complaint sought an injunction only in respect of this extension (R. 4), but the amended complaint and the bill of intervention of the intervening plaintiffs sought

an injunction also in respect of the other extension originally proposed from Charlotte to Winston-Salem, and the final decree is in conformity with the prayer of the amended complaint and the prayer of the bill of intervention (R. 487).

7. The District Court, relying on the opinion of this Court in *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266, which interpreted that part of Paragraph (22) which exempts, from the Commission's authority over the construction and abandonment of railroad mileage, spur and certain other tracks "located or to be located wholly within one State" (R. 451), held that, although the quoted phrase does not limit the exemption of interurban electric railways, it was not the intention of Congress by Paragraph (22) to deprive "the Interstate Commerce Commission of jurisdiction and its control for abandonment and construction purposes over any important interstate carrier whose general transportation of interstate freight was so large as to make it a carrier of national importance (R. 454, 455). The Court said:

> "* * * The question as we see it, is not reducible to the single inquiry as to whether or not the Piedmont and Northern is an 'interurban railway'. We think a more accurate statement of the question is whether the Piedmont and Northern, although literally an interurban electric railway, not operated as part of a general steam railroad system, possesses so many of the characteristics and functions of a great

interstate carrier as to negative any conclusion that Congress ever intended to exempt a railroad of its type and magnitude from regulation by the Interstate Commerce Commission with respect to control over abandonments and extensions. However, we reason about the words 'interurban' and 'electric', the Piedmont and Northern comes within the *prima facie* meaning of each of these words. It has been so denominated both as a matter of common designation by the public and of classification in railroad circles. It was and has been referred to as 'interurban' by Court and Commission, State and Federal. Even the Interstate Commerce Commission, itself, has for many purposes classified it as an interurban railway, and on the trial of this case documents were introduced wherein the Commission had, in referring to the Piedmont and Northern, referred to it as an interurban railway. It is not, as we see it, a contest to be waged over the word 'interurban' and its meaning, but it is a decision of the question of whether or not paragraph 22, when construed in the light of the whole Transportation Act, can be said to include within its terms, the Piedmont and Northern Railroad, when due regard is given to its history, its physical characteristics, its methods of operation, the character of traffic handled, and its importance as an interstate carrier viewed from a national standpoint.

"We feel that the case which gives us the most help, and the one which really has caused this court to come to the conclusion announced, is a case which construes the other clause in the particular amendment which we are here called upon to construe" (R. 450, 451).

Texas & Pacific Railway Co. v. *Gulf, Colorado & Santa Fe Railway Co.* was the case referred to, and the Court quoted from it at length. It concluded that petitioner's claim of exemption as an interurban electric railway could not succeed chiefly because "the Piedmont and Northern as it now exists is a railroad of such importance from a national standpoint as to negative any idea that its proposed extensions are matters of purely local interest" (R. 455), and because the Court was of the opinion "that the Piedmont and Northern is now an important factor in through freight transportation, and that with the proposed extensions it would become such an important line of railway as to injure seriously the three great trunk lines now serving the Atlantic Seaboard in the handling of north and south traffic" (R. 456).

B.

Reasons Relied on for the Allowance of the Writ.

1. The scope of the term, "interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation," as used in the Interstate Commerce Act, as amended by Transportation Act, 1920, is an important question of Federal law which has not been, but should be settled by this Court; for the reason that such railways, even though engaged in interstate commerce and in other respects subject to the Interstate Commerce Act as so amended, are exempt from the jurisdiction of the Interstate Commerce Commission over the construction, extension and abandonment of lines and the issuance

of securities; in cases where the exemption does not apply the jurisdiction of the Interstate Commerce Commission is exclusive of the jurisdiction of the State authorities; in cases where the exemption does apply the State authorities have exclusive jurisdiction; it is therefore important that the question of jurisdiction, as between the Commission and the State authorities, be settled by this Court.

2. The District Court in interpreting the term, "interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation," gave no consideration to the context of those provisions of the Interstate Commerce Act, as amended by Transportation Act, 1920, in which the term appears.

3. The decision of the District Court confining the meaning of the term, "interurban electric railways", to that class of electric carriers whose operations are of purely local interest, as distinguished from carriers of national importance, is probably in conflict with the decisions of this Court in *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, and *United States* v. *Village of Hubbard*, 266 U. S. 474, dealing with the jurisdiction of the Interstate Commerce Commission over electric carriers engaged in interstate commerce.

4. The District Court, in treating the opinion of this Court in the case of *Texas & P. R. Co.* v. *Gulf & S. F. R. Co.*, 270 U. S. 266, as controlling the decision in this case, carried the doctrine of that opinion too far.

WHEREFORE it is respectfully submitted that this petition should be granted.

This 28th day of January, A. D. 1932.

PIEDMONT AND NORTHERN
RAILWAY COMPANY,
By H. J. HAYNSWORTH,
R. S. HUTCHISON,
W. S. O'B. ROBINSON, JR.,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the U. S. District Court, for the Western District of South Carolina, was written by Judge J. Lyles Glenn, and was filed May 23, 1931. It appears on page 435 of the record, and is reported in 51 F. (2d), 766.

Jurisdiction.

(*a*) The jurisdiction of this Court is invoked under Sec. 240 (*a*) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A., Sec. 347 (*a*); and as to the timeliness of its application for a writ of certiorari petitioner relies on the second paragraph of Sec. 8 of the Act of February 13, 1925, c. 229, Sec. 8, 43 Stat. 940, 28 U. S. C. A., Sec. 350.

(*b*) The final decree of the U. S. District Court, sought to be reviewed, is dated June 9, 1931 (R. 487). Petitioner's appeal from the final decree was filed August 8, 1931, and was allowed August 9, 1931 (R. 511). The transcript of the record was filed and the appeal docketed in the U. S. Circuit Court of Appeals, Fourth Circuit, November 23, 1931, pursuant to the order of the District Court extending the time for docketing the appeal (R. 510). The cause has not been heard in the Circuit Court of Appeals, and has been

continued by that Court until its April Term, 1932 (R. 515).

(*c*) The suit was brought, and the jurisdiction of the District Court was invoked, under Paragraph (20) of Sec. I of the Interstate Commerce Act, as amended by Transportation Act, 1920, 49 U. S. C. A., Sec. 1 (20), and under Sec. 24, Paragraph 8, of the Judicial Code, 28 U. S. C. A., Sec. 41, subd. (8) (R. 2). It was brought by the Interstate Commerce Commission, the Southern Railway Company and other steam railroads intervening as plaintiffs, to enjoin petitioner from constructing extensions of its lines of electric railway without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity under Paragraph (18), Sec. I, of the Act. The District Court ruled that petitioner is subject to the provisions of Paragraph (18), and therefore must obtain the certificate required by that paragraph before undertaking the construction of the extensions, and accordingly entered a final decree in conformity with the prayer of the complaint permanently enjoining petitioner from constructing the proposed extensions unless and until it first obtains from the Commission a certificate of public convenience and necessity (R. 487).

(*d*) The cases relied on to sustain the jurisdiction of this Court are as follows:

Texas & New Orleans R. R. Co. v. *Northside Belt Ry. Co.*, 276 U. S. 475;

Western Pacific California Railroad Co. v. *Southern Pacific Co.*, No. 51, October Term, 1931. Decided November 23, 1931.

Statement of Case.

The case is sufficiently stated in the accompanying petition for writ of certiorari.

Specification of Assigned Errors Intended to be Urged.

The principal question raised by the assignments of error is whether the District Court erred in holding that the railway of petitioner is not an interurban electric railway, which is not operated as a part of a general steam railroad system of transportation, within the scope of the exemption given such interurban electric railways by Paragraph 22 of Section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, 49 U. S. C. A., Sec. 1 (22).

Error is also assigned to the facts found by the District Court and to the exclusion of evidence relating to the interurban character of petitioner's railway, but these assignments of error raise no separate questions and are merely incidental to the principal question presented.

Statutes.

Transportation Act, 1920, Sec. 402 (49 U. S. C. A., Sec. 1), provides:

> Paragraph "(18) * * * no carrier by railroad subject to this Act shall undertake the extension of its line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity

require or will require the construction * * * of such * * * extended line * * *" Paragraph "(20) * * * Any construction contrary to the provisions * * * of Paragraph (18) may be enjoined by any court of competent jurisdiction at the suit of * * * the Commission * * * or any party in interest * * *" Paragraph "(22) The authority of the Commission conferred by Paragraphs (18) to (22), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Section 439 of the Transportation Act of 1920 (49 U. S. C. A., Sec. 20*a*), which inserts in the Interstate Commerce Act the new Section 20*a*, concerning the issue of securities, by Paragraph 1 excludes from the scope of that section "a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation."

Section 422 of the Transportation Act of 1920 (49 U. S. C. A., Sec. 15*a*), which inserts in the Interstate Commerce Act the new Section 15*a* dealing with the determination of a fair return, by Paragraph 1 excludes "(*b*) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (*c*) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight."

Section 204 of the Transportation Act of 1920 (49 U. S. C. A., Sec. 73), concerning the reimbursement of deficits during Federal Control excludes by Paragraph (*a*) "any street or interurban electric railway which has as its principal source of operating revenue urban, suburban or interurban passenger traffic or sale of power, heat, and light, or both * * *."

Section 209 of the Transportation Act of 1920 (49 U. S. C. A., Sec. 77), concerning the guaranty to carriers after the termination of Federal Control excludes by Paragraph (*a*) "a street or interurban electric railway not under Federal Control at the time Federal Control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both."

ARGUMENT.

I.

The scope of the term, "Interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transporation," as used in the Interstate Commerce Act, as amended by Transportation Act 1920, is an important question of Federal law, which has not been, but should be, settled by this Court.

The jurisdiction of the Interstate Commerce Commission, where it exists in respect of the construction, extension or abandonment of lines and the issuance of securities by carriers, is exclusive of the jurisdiction of the State authorities. Paragraph 20 of Section 1

provides that from and after the issuance of a certificate of public convenience and necessity for the construction, extension or abandonment of lines, "the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation or abandonment covered thereby." Paragraph 7 of Section 20*a* provides that the jurisdiction conferred upon the Commission over the issuance of securities by carriers "shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

"Street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation" by Paragraph 22 of Section 1 are exempt from the jurisdiction of the Commission over the construction, extension or abandonment of lines, and in Paragraph 1 of Section 20*a* substantially the same language is used in exempting such railways from the jurisdiction of the Commission over the issuance of securities by railroads.

If the exemption applies, then the carrier, even though engaged in interstate commerce and in other respects subject to the jurisdiction of the Commission, is in respect of the construction, extension and abandonment of lines and the issuance of securities subject to the exclusive jurisdiction of the State au-

thorities. *Western & Atlantic R. Co.* v. *Georgia Public Service Commission*, 267 U. S. 493.

Paragraph 20 of Section 1 provides that, "Any carrier which, or any director, * * * or person, acting for or employed by such carrier, who knowingly authorized, consents to, or permits any violation of the provisions of this paragraph or of Paragraph (18) of this section, shall upon conviction thereof be punished by fine of not more than $5,000 or by imprisonment for not more than 3 years, or both." Paragraph 11 of Section 20*a* imposes even more severe penalties and liabilities on "any director, officer, attorney or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the Commission's order or orders in the premises, or any application not authorized by the Commission of the funds derived by the carrier through such sale or other disposition of such securities." Like penalties are usually imposed by State laws for the violation of their provisions.

If an electric carrier is subject to the Interstate Commerce Act and not within the exemption in question, a failure to comply with the provisions of the Act in respect of the construction, extension and abandonment of lines and the issuance of securities subjects it and its officers, directors and agents who knowingly consent to or concur in the prohibited act to the penalties imposed by the Federal statute; while if such carrier is within the exemption and therefore subject

to the jurisdiction of the State authorities a failure to comply with the applicable State laws subjects the carrier, and its responsible officer, directors and agents, to the penalties imposed by such laws.

Manifestly it is important that the question of jurisdiction, as between the Commission and the State authorities, be definitely settled by this Court. The decision of the District Court affords no definite standard as to what constitutes an "interurban electric railway which is not operated as a part of a general steam railroad system of transportation", within the meaning of that term as used in the Interstate Commerce Act. According to the opinion of the District Court the purpose of the exemption given by the term in question "was to deal with local situations, and it in no way evidences a serious intention of depriving the Interstate Commerce Commission of jurisdiction and its control for abandonment and construction purposes over any important interstate carrier whose general transportation of interstate freight was so large as to make it a carrier of national importance", and the exemption applies to electric carriers only when their "proposed extensions are matters of purely local interest." The opinion indicates no test by which to determine whether an electric railway is "a carrier of national importance" or one "of purely local interest"; or by which to determine to what extent it may engage in the "general transportation of interstate freight" without losing exemption as an interurban electric railway.

The fact that an electric railway is engaged in the general transportation of interstate freight, that it

draws from this source the major part of its operating revenues, and that it participates with steam railroads in through freight routes and joint rates does not debar it from classification as an interurban electric railway within the scope of that term as used in the Act. *United States* v. *Village of Hubbard*, 266 U. S. 474. Carriers whose operations "are matters of purely local interest", if by that expression is meant carriers engaged exclusively in intrastate commerce, are clearly not within Federal jurisdiction. *Texas & N. O. R. Co.* v. *Northside Belt R. Co.*, 276 U. S. 475.

II.

The District Court in interpreting the term, "Interurban electric railways which is not operated as a part or parts of a general steam railroad system of transportation," gave no consideration to the context of those provisions of the Interstate Commerce Act, as amended by Transportation Act, 1920, in which the term appears.

No consideration was given to the difference between the exception in Section 15*a* of the Act and the exception in Paragraph 22 of Section 1 and in Paragraph 1 of Section 20*a*. Section 15*a* excludes from the scope of its provisions "interurban electric railways unless operated as a part of a general steam railroad system of transportation *or engaged in the general transportation of freight.*" Paragraph 22 of Section 1 excludes from the scope of the provisions of Paragraphs 18 to 21 "interurban electric railways, which are not operated as a part or parts of a gen-

eral steam railroad system of transportation", and the exception in Paragraph 1 of Section 20*a* is in substantially the same language. Interurban electric railways are excluded from the scope of the provisions of Section 15*a* subject to two exceptions; they are excluded from the scope of the provisions of Paragraph 18 of Section 1 and of Section 20*a* subject to only one exception. If Congress had intended to except interurban electric railways engaged in the general transportation of freight from the exemption given interurban electric railways by Paragraph 22, it would have used the same language in that paragraph which it used in Section 15*a*. The one exception in Paragraph 22 should not be given the same effect as the two exceptions in Section 15*a*. The acceptance of the argument that an electric railway forfeits the right to classification as an interurban by engaging in the general transportation of freight would render meaningless the language of Section 15*a* excepting from exclusion from the scope of the provisions of that section "interurban electric railways * * * engaged in the general transportation of freight."

The Transportation Act of 1920, Section 204 (49 U. S. C. A., Sec. 73), gives recognition to the fact that an interurban electric railway may draw the major part of its operating revenues from freight traffic; and Section 209 (49 U. S. C. A., Sec. 77), not only to this fact but also to the fact that interurban electric railways were taken under Federal Control under the provisions of the Federal Control Act of March 21, 1918, 40 Stat. L. 451.

III.

The decision of the District Court confining the meaning of the term "Interurban electric railways" to that class of electric carriers whose operations are of purely local interest, as distinguished from carriers of national importance, is probably in conflict with the decisions of this Court in Omaha & C. B. Street R. Co. vs. Interstate Commerce Commission, 230 U. S. 324, and United States vs. Village of Hubbard, 266 U. S. 474, dealing with the jurisdiction of the Interstate Commerce Commission over electric carriers engaged in interstate commerce.

The Omaha case involved the question as to whether an interstate street railway operating between Omaha, Nebraska, and Council Bluffs, Iowa, was a carrier within the purview of the Act to Regulate Commerce, so as to warrant the Interstate Commerce Commission in assuming jurisdiction over its passenger fares. The Court held that it was not within the purview of the Act for the reason that—

> "The railroads referred to in the Act were not those having separate, distinct, and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce."

The Court further said:

> "But it is said that since 1887, when the Act was passed, a new type of interurban road has

been developed which, with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mails, for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railway business, and hauling no freight."

In the *Village of Hubbard case* the Court said:

"The development of interurban roads became general about 1902. The authority to regulate them has been consistently exercised by the Commission in many cases and for many purposes. Since 1915, interurban electric roads have been required to file with it annual reports of their finances and operations. *Jurisdiction over Urban Electric Lines,* 33 Inters. Com. Rep. 536. In exercising authority over their passenger fares, no distinction has been made between those interurban roads which were engaged in the general transportation of freight in addition to their passenger and express business and those which were not. On the other hand, the distinction suggested in *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission,* 230 U. S. 324, 337, 57 L. Ed. 1501, 1506, 46 L. R. A. (N. S.) 385, 33 Sup. Ct. Rep. 890, between interurban railroads and urban or suburban street railways, has been carefully observed.

"* * * The correctness of the Commission's action in assuming jurisdiction over the interurban roads is confirmed by the action of

> Congress, which, in recent amendments of the Act to Regulate Commerce, limited, in respect to certain subjects, the authority over them. The Commission entertained, in 1908, applications of interurban electric railroads to establish for freight through routes and joint rates with steam railroads. The Act of June 18, 1910, chap. 309, 36 Stat. at L. 539, 551, 552, Comp. Stat. Sec. 8583, 4 Fed. Stat. Anno. 2d ed., p. 469, provided that 'the Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in * * * transporting freight in addition to their passenger and express business and railroads of a different character.' Transportation Act, February 28, 1920, chap. 91, 41 Stat. at L. 456, Comp. Stat. Sec. 10,071¼, Fed. Stat. Anno. Supp. 1920, p. 72, enlarged, in several respects, the powers of the Commission, and dealt also in other ways with carrier engaged in interstate commerce. In doing so, it provided expressly, in five sections, for the exclusion of certain electric railways from the operation of the powers conferred; and it also differentiated interurban electric railways from street and suburban railways by specific reference to each, although a distinction in treatment was made in only one case."

An electric railway engaged exclusively in intrastate commerce is not within the purview of the Interstate Commerce Act, and therefore does not need express exclusion from any of its provisions. It comes within the purview of the Act only when, by undertaking to

engage in interstate commerce, it becomes a carrier of national importance; and the same facts which make it subject to the provisions of the Act cannot be given the effect of depriving it of exemption, where exemption is expressly given, as in the case of interurban electric railways, not operated as a part of a general steam railroad system of transportation.

In *Texas & N. O. R. Co.* v. *Northside Belt R. Co.*, 276 U. S. 475, 479, the Court said:

> "The mere fact that a railroad lies wholly within one state, and is to be built by an independent corporation, does not, of course, prevent the application of Paragraphs 18 to 22. If it undertakes to engage in interstate commerce, its operation becomes immediately a matter of national concern and it comes within the purview of those paragraphs. But Congress did not in terms prohibit wholly intrastate carriers from building lines to be used wholly in intrastate commerce. As long as the North-state Company confines its operations to intrastate commerce, it will not violate the federal law."

IV.

The District Court in treating the opinion of this Court in the case of Texas & P. R. Co. vs Gulf & S. F. R. Co., 270 U. S. 266, as controlling the decision in this case, carried the doctrine of that opinion too far.

In denying petitioner the exemption which it claims under Paragraph 22, the District Court said:

> "We feel that we have followed the guide as laid down for us by the United States Supreme

Court in the case of *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266" (R. 457).

In the *Texas & Pacific case* the Court pronounced on that part of Paragraph 22 which exempts from the scope of the provisions in Paragraph 18 the construction of industrial and certain other tracks "located wholly within one state".

The question was whether the extension proposed by the Gulf, Colorado & Santa Fe Railway Company was within the language of the exemption excluding spur, industrial, team, switching or side tracks located wholly within one state. In deciding this question the Court referred to the fact that the statute was intended to prevent waste involved in new railway construction, and to the fact that the proposed extension would go into new territory serving several industries and would divert from other railways freight of very considerable importance. The Court said, when read in the light of the Congressional policy, the meaning and scope of the terms "extensions" and "industrial tracks" became clear, and held that the proposed new track would be an "extension" and not an "industrial track" within the meaning of the statute. But manifestly the language of the Court in differentiating between an extension on the one hand and an industrial or side track on the other, will not control in determining the meaning of the provision excluding interurban electric railways not operated as a part or parts of a general steam railroad system of transportation.

The Court said:

> "Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier, to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of a national concern."

The restriction, "located or to be located wholly within one state", is not attached to the exemption of interurban electric railways. The only restriction on the exemption of such railways is contained in the language excluding from exemption those, "which are operated as a part or parts of a general steam railroad system of transportation". The exemption extends not only to the extensions of an existing interurban electric railway, but to the new construction of such a railway in its entirety. It may be constructed across state lines so as to be interstate in respect of any physical location as well as in respect of the traffic to be handled.

In the case of such a railway it cannot be said that "the question whether the construction should be allowed or compelled depends largely upon local condi-

tions which the state regulating body is peculiarly fitted to appreciate". If it is constructed for the purpose of engaging in interstate commerce so as to come within the purview of the provisions of the Interstate Commerce Act it cannot be denied that it is "of national concern", because by undertaking to engage in interstate commerce it immediately becomes a carrier of national concern.

It would hardly be possible—certainly not practicable, to construct an interurban electric railway of sufficient importance to bring it within the purview of the Interstate Commerce Act without extending into territory already served by other carriers and competing with them.

The doctrine of the opinion in the *Texas and Pacific case* is applicable only in determining whether the construction of new mileage by a carrier, not wholly exempt from the provisions of Paragraph 18, comes within the class of the specially exempted tracks, designated in Paragraph 22, or within the class of those not exempted. It is not applicable to a carrier, all of whose tracks are exempt.

The District Court, treating as controlling the opinion of this Court in the *Texas and Pacific case*, enjoined the construction of the proposed extensions because the Court found that they would serve territory already served by other carriers and would injure these other carriers by diverting from them a substantial amount of traffic (R. 455, 456).

And evidently because it considered that opinion controlling, the Court gave no consideration, either in its

opinion or in its findings of fact, to the fact that petitioner's railway has been constructed and equipped and is maintained and operated as an interurban electric railway, as distinguished from a street or suburban electric railway on the one hand, and from electrified sections of steam railroads on the other hand (R. 127, 128, 129, 132, 139, 143, 163, 169, 170, 296, 310-319, 344-349, 368-377, 387, 388).

The Court gave no consideration to the fact that petitioner's railway belongs to that class of electric railways which are now, and were at and prior to the time of the passage of the Transportation Act of 1920, commonly known and described as interurban electric railways (R. 300, 305-310, 371, 378; Special Reports of the Census Office, Street and Electric Railways, 1902, pp. 3, 105, and 214; Special Reports of The Bureau of the Census, Street and Electric Railways, 1907, pp. 93, 265, and 272; Census Report, Electric Railways 1917, p. 107; *Chicago & M. Electric R. Co.* v. *Illinois C. R. Co.*, 13 I. C. R. 20; *Cedar Rapids & I. C. R. & Light Co.* v. *Chicago & N. W. R. Co.*, 13 I. C. R., 250; *U. S.* v. *Village of Hubbard*, 266 U. S. 474, and footnotes).

Nor did the Court give consideration to the fact that until the Commission's ruling of April 3, 1928, in *Proposed Construction of Lines by Piedmont and Northern Railway Company*, 138 I. C. C., 363, petitioner's railway had been treated by the Commission and other Federal authorities as an interurban electric railway (R. 173, 362-365, 450, 451; Decision No. 33, U. S. Railroad Labor Board, Docket 26-*a*, December 11, 1920).

Conclusion.

It is, therefore, respectfully submitted that the accompanying petition for a writ of certiorari to the United States Circuit Court of Appeals, for the Fourth Circuit, should be granted.

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CHARLOTTE, N. C., *January* 28, 1932.